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U.S. Citizenship
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Services

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FILE: [Redacted]
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Office: VERMONT SERVICE CENTER

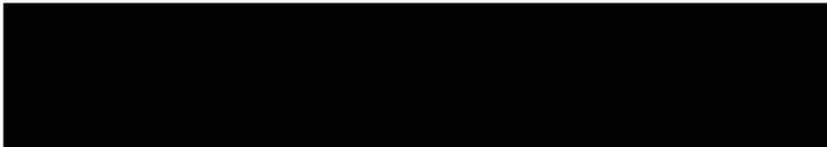
Date: AUG 17 2007

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition¹ and affirmed that decision after reviewing a subsequent motion to reopen/reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner² is a restoration business. It seeks to employ the beneficiary permanently in the United States as an ornamental stone restorer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated December 12, 2005, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

¹ As a preface to this discussion concerning the ability to pay the proffered wage, the petitioner is meant to encompass the business entities as mentioned for which evidence has been submitted but according to the I-140 petition the petitioner is identified as [REDACTED]

² The labor certification is in the name of [REDACTED], located at [REDACTED] Elmhurst, New York and it has a federal employer's identification number of # [REDACTED]. The petition is filed in the name of [REDACTED] located at [REDACTED] Brooklyn, New York and it has a federal employer's identification number of [REDACTED]. The petitioner states it is a successor-in-interest by merger with R [REDACTED]. In order for a "successor in interest" determination to be made, the following documentation should be submitted along with a new I-140 petition: a copy of the notice of approval for the initial Form I-140; a copy of the labor certification submitted with the initial Form I-140; documentation to establish the ability to pay the proffered wage - evidence of this ability must be either in the form of copies of annual reports, federal tax returns, or audited financial statements; a fully executed uncertified labor certification (Form ETA 750, Parts A & B) completed by the petitioner; documentation to show how the change of ownership occurred: buyout, merger, etc.; and documentation to show the petitioner will assume all rights, duties, obligations, and assets of the original employer. An successor in interest must establish that it has assumed all of the rights, duties, obligations, and assets of the original employer; continue to operate the same type of business as the original employer; and, establish that the new business has the ability to pay as of the priority date. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981). Instead of evidence demonstrating [REDACTED]'s merger with the petitioner, the record of proceeding contains an affidavit from R [REDACTED]'s vice-president explaining that after the merger all the staff remained the same. Such a statement is insufficient to meet the aforesaid Dial Auto Repair Shop elements for demonstrating that the petitioner is a successor-in-interest to Restore-It Inc. and is the an additional ground of ineligibility. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001.³ The proffered wage as stated on the Form ETA 750 is \$ 28.61 per hour (\$59,508.00 per year).

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴

Relevant evidence in the record includes the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a Notice of Findings dated October 28, 2004 from the U.S. Department of Labor; cover letters from counsel dated October 17, 2005 and November 30, 2004; an affidavit from [REDACTED] i attested November 29, 2004; an employee list of [REDACTED]. dated November 24, 2004; an undated employee list of [REDACTED]; Brend

³ It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

⁴ The submission of additional evidence on appeal is allowed by the instructions to the CIS Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Renovation Corp.'s U.S. Internal Revenue Service Form 1120 tax returns for 2003 and 2004, and Restore-It Inc. U.S. Internal Revenue Service Form 1120 tax returns for 2001 and 2002; a spreadsheet for 1999 through 2004; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2003 and to currently employ 12 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 1, 2001, the beneficiary did not claim to have worked for the petitioner.

Accompanying the appeal, counsel submits additional evidence that includes the following documents: counsel's cover letter dated March 7, 2006; a Wage and Tax statement for 2004 from the petitioner to [REDACTED]; the petitioner's bank statements from January 2001 to July of 2005; copies of payments made by checks to other companies in years 2000, 2001, 2002, 2003 and 2005; a spreadsheet for 1999 through 2004; and statements of Application and Certification for payments made to other companies.

On appeal, the petitioner asserts that the director's decision is not based upon law or regulation or the interpretation thereof, that it is arbitrary and capricious, that it is a clear abuse of discretion and lacks specificity.

In his prior motion, counsel asserted that hiring the beneficiary will "turn the relatively expensive process of stone restoration and repair into a more profitable one" since large amounts were paid to subcontractors for duties the beneficiary will perform at a lower cost.

Counsel also contended that a favorable ratio between total current assets and total current liabilities is evidence of the petitioner's ability to pay the proffered wage.

Counsel cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) in support of his contention. Counsel referred to a decision issued by the AAO concerning the normal accounting practice of a company and the ability to pay the proffered wage, but did not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel asserted that the totality of the circumstances test "is the best and most fair method in evaluating the business" and generally discusses ready sources of cash, replacement of outside contractors, accrual accounting methods, salaries, wages and officers' compensation all as evidence of the ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages,

although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The tax returns⁵ demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120 of [REDACTED] stated net income of \$4,019.00.
In 2002, the Form 1120 of [REDACTED] stated net income of \$0.00.
- In 2003, the Form 1120 of [REDACTED] stated a loss of <\$5,682.00>⁶.
- In 2004, the Form 1120 of [REDACTED] stated net income of \$4,023.00.

Since the proffered wage is \$59,508.00 per year, [REDACTED] and [REDACTED] did not have the ability to pay the proffered wage from an examination of their net incomes for years 2001, 2002, 2003 and 2004.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in

⁵ Tax returns for 1999 and 2000 were also submitted. Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. IRS Form 1120, Line 28 that states the petitioner's taxable income before net operating loss deduction and special deductions, which will be referred to as net income in these proceedings.

⁶ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- Restore-It Inc. net current assets during 2001 and 2002 were <\$26,226.00> and <\$34,641.00>.
- In 2003 and 2004 [REDACTED] stated net current assets of <\$4,869.00> and <\$8,448.00>.

Therefore, for the years for which tax returns were submitted, [REDACTED] and [REDACTED] did not have sufficient net current assets to pay the proffered wage. Thus even if the petitioner established that it is a successor-in-interest to [REDACTED], the ability to pay the proffered wage cannot be demonstrated by either business.

Counsel asserted in his motion that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁸ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage.⁹ The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as an ornamental stone restorer will significantly increase profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Along the same line of assertion, counsel also asserts that hiring the beneficiary will "turn the relatively expensive process of stone restoration and repair into a more profitable one" since large amounts paid to subcontractors are for duties the beneficiary will perform at a lower cost. In substantiation of this contention counsel has submitted a spreadsheet summary showing payments made to other companies that relate to projects it has undertaken (and also as evidenced by statements of Application and Certification for Payments made to other companies).

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁸ 8 C.F.R. § 204.5(g)(2).

⁹ It is noted that CIS now utilizes calculations based upon evidence submitted in the determination of net income, net current assets or the difference between wages actually paid and the proffered wage among others.

The petitioner's stone work projects costs over the years are evidenced by the statements mentioned above with the stone work restoration and repair component broken out in the spread sheet submitted into evidence. According to a spreadsheet dated October 4, 2006 submitted by petitioner, the total amount of payments made to subcontractors for years 1999 through 2004 was \$165,434.00 for stone work restoration and repair. Assuming that the beneficiary was employed at the proffered wage during that period and assuming that the beneficiary was able to accomplish alone what was completed by the subcontractors, then the wage cost to the petitioner would have been \$297,540.00. \$297,540.00 is significantly more than \$165,434.00. Counsel's contention that the beneficiary will perform at a lower cost is incorrect and not supported by the facts presented in this case. Based upon the data presented replacement of outside contractors with the beneficiary at the proffered wage will increase and not decrease the petitioner's cost for stone restoration and repair.

Counsel contends that the favorable ratio between total current assets and total current liabilities is evidence of the petitioner's ability to pay the proffered wage. Counsel claims that the current ratio, current assets/current liabilities, shows that the petitioner has the ability to pay the proffered wage in each relevant year. Financial ratio analysis is the calculation and comparison of ratios that are derived from the information in a company's financial statements. The level and historical trends of these ratios can be used to make inferences about a company's financial condition, its operations, and attractiveness as an investment. The AAO notes that there is no single correct *value* for a current ratio, rendering it less useful for determinations of an entity's ability to pay a specific wage during a specific period. In isolation, a financial ratio is a useless piece of information.¹⁰

While counsel argues that the current ratio shows the petitioner has the ability to pay the proffered wage, he provides no evidence of any industry standard that would allow a comparison with the petitioner's current ratio. In addition, he has not provided any authority or precedent decisions to support the use of current ratios in determining the petitioner's ability to pay the proffered wage. Moreover, because the current ratio is not designed to demonstrate an entity's ability to take on the additional, new obligations such as paying an additional wage, this office is not persuaded to rely upon it.

Counsel has submitted the petitioner's bank statements from January 2001 to July of 2005. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise

¹⁰ The observation that a particular ratio is high or low depends on the purpose for which the ratio is being observed. In context, however, a financial ratio can give a financial analyst an excellent picture of a company's situation and the trends that are developing. A ratio gains utility by comparison to other data and standards, such as the performance of the industry in which a company competes. Ratio Analysis enables the business owner/manager to spot trends in a business and to compare its performance and condition with the average performance of similar businesses in the same industry. Important balance sheet ratios measure liquidity and solvency (a business's ability to pay its bills as they come due) and leverage (the extent to which the business is dependent on creditors' funding). Liquidity ratios indicate the ease of turning assets into cash and include the current ratio, quick ratio, and working capital. See *Financial Ratio Analysis*, <http://www.finpipe.com/equity/finratan.htm> (accessed March 21, 2006); *Financial Management, Financial Ratio Analysis*, <http://www.zeromillion.com/business/financial/financial-ratio.html> (accessed March 21, 2006); *Industry Financial Ratios, Financial Ratio Analysis*, http://www.ventureline.com/FinAnal_indAnalysis.asp (accessed March 21, 2006).

paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L in determining the petitioner's net current assets.

Counsel asserts that the accrual accounting method used resulted in the petitioner's short term liabilities exceeding the short term assets. The petitioner's tax returns were prepared pursuant to the accrual method, in which revenue is recognized when it is earned, and expenses are recognized when they are incurred. This office would, in the alternative, have accepted tax returns prepared pursuant to cash convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the accrual method then the petitioner, whose taxes are prepared pursuant to accrual, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not pursuant to the accountant's adjustments.

Counsel asserts that wages and officers compensation are evidence of the ability to pay the proffered wage. Contrary to counsel's assertion, Citizenship and Immigration Services (CIS) may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Further wages paid to others are expenses and they cannot be considered assets. Even if we were to consider the discretionary distribution of corporate profit as officer's compensation, the record of proceeding contains no evidence that the petitioner's corporate officers could or would forego any portion of their officer's compensation.

Counsel asserts that the totality of the circumstances test "is the best and most fair method in evaluating the business." In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations

were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 or 2002 were an uncharacteristically unprofitable years for [REDACTED], or that years 2003 and 2004 were uncharacteristically unprofitable years for the petitioner even assuming, assuming arguendo, that the petitioner could establish it is a successor-in-interest to Restore It Inc. which it has not demonstrated by the evidence submitted.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.